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No. 93-870

In the Supreme Court
OF THE
United States

OCTOBER TERM, 1993

LEVALD, INC., a Wisconsin Corporation, Trustee of Indian Springs Trust,
Petitioner,
v.
CITY OF PALM DESERT, a California Municipal Corporation,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

DONALD R. LINCOLN
(Counsel of Record)
LINDA B. REICH
ENDEMAN, LINCOLN, TUREK & HEATER
600 B Street, Suite 2400
San Diego, California 92101
(619) 544-0123

DAVID J. ERWIN
City Attorney
MICHAEL J. ANDELSON
MARSHALL S. RUDOLPH
BEST, BEST & KRIEGER
39700 Bob Hope Drive #312
Rancho Mirage, California 92270
(619) 568-2611

Attorneys for Respondent City of Palm Desert

Bowne of Los Angeles, Inc., Law Printers (213) 627-2200

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QUESTIONS PRESENTED

1. Was the Ninth Circuit correct in affirming the dismissal of a federal suit on statute of limitations grounds where the park owner had filed facial taking challenges to a mobilehome park space rent review ordinance more than one year after its enactment?

2. Was the Ninth Circuit correct in concluding that the statute of limitations for a facial regulatory taking challenge to a mobilehome park space rent review ordinance begins to run when the ordinance is enacted?

LIST OF PARTIES

The parties to the proceeding below were Petitioner Levald, Inc., a Wisconsin Corporation, Trustee of the Indian Springs Trust, a Wisconsin Trust Corporation, owner of the Indian Springs Mobilehome Park ("Levald"), and Respondent City of Palm Desert, a California Municipal Corporation ("City").

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RESPONDENT'S BRIEF IN OPPOSITION

Respondent City of Palm Desert ("City") respectfully requests that this Court deny Levald, Inc.'s ("Levald") Petition for Writ of Certiorari ("Petition") seeking review of the United States Court of Appeals for the Ninth Circuit's ("Ninth Circuit") opinion in this case.

OPINIONS BELOW

On September 9, 1991, the United States District Court for the Central District of California issued its unpublished Order granting City's Motion to Dismiss and dismissing Levald's action. See, Petition at C1-20. On July 8, 1993, the Ninth Circuit issued its opinion affirming in part and reversing and remanding in part the District Court ruling. See, *Levald, Inc. v. City of Palm Desert*, 998 F.2d 680 (9th Cir. 1993); see also, Petition at A1-31.

On September 3, 1993, the Ninth Circuit issued an unpublished Order denying Levald's Petition for Rehearing and rejecting the Suggestion for a Rehearing En Banc. See, Petition at B1-2.

JURISDICTION

The Ninth Circuit decision was filed July 8, 1993. On or about July 22, 1993, Levald filed a Petition for Rehearing. On September 3, 1993, the Ninth Circuit denied the Petition for Rehearing. Levald's Petition for Certiorari was docketed with the United States Supreme Court on December 2, 1993. The jurisdiction of the United States Supreme Court was invoked under 28 U.S.C. Section 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fifth Amendment to the United States Constitution provides in pertinent part:

> [N]or shall private property be taken for public use, without just compensation.

The Fourteenth Amendment to the United States Constitution provides in pertinent part:

> [N]or shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Title 42, United States Code, Section 1983, provides in pertinent part:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State . . . subjects, or causes to be subjected, any citizen of the United States . . . to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

The California Mobilehome Residency Law (Cal. Civ. Code, Section 798 et seq.) governs many aspects of the relationship between a mobilehome park owner and a mobilehome owner residing on a rented space in a mobilehome park. Civil Code, Section 798.55(a), contains legislative justification for the unique protections provided mobilehome owners. Protections include restrictions on terminating a space tenancy (e.g., Civil Code, Sections 798.55(b) and 798.56) and restrictions preventing a park owner from interfering with or preventing a homeowner from selling his home to a new purchaser as long as the prospective homeowner has the financial ability to pay the space rent and does not have a prior history indicating that he or she will not comply with the rules and regulations of the park. (E.g., Civil Code, Section 798.74).

California Code of Civil Procedure, Section 340(3) provides that the statute of limitations for personal injuries "caused by the wrongful act or neglect of another" is one year.

Palm Desert Ordinance No. 456 provides for mobilehome park rent review. It permits a park owner to automatically increase park space rent by 75% of the CPI increase and to apply for a "hardship" increase (Section 9.50.060) to ensure that park owners "receive a just and reasonable return on their property." Ordinance, Preamble.

STATEMENT OF THE CASE[1]

A. Background.

The City of Palm Desert ("City") has a population of approximately 23,000 and is located about 10 miles from Palm Springs in

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[1]In the course of Levald's Statement of the Case (Petition at 4-8) and later in Argument (Petition at 17-22), Levald makes certain "allegations" that are neither in the record below nor based on facts that are judicially noticeable under Fed. R. Evid., Rule 201(b). Examples of such allegations include, "Today, land values in the park's vicinity are 10 times values in 1983" (Petition at 5); "The rent Levald now receives is a fraction of the current fair market rent for spaces in the park" (Petition at 6); A recent rent increase "pushed Levald's rent return ever increas-

Riverside County in the State of California. The City has four mobilehome parks with a total of 692 spaces. The Indian Springs Mobilehome Park is owned and operated by Levald, Inc. ("Levald") and has 191 spaces.

On June 23, 1983, the City enacted Ordinance 329 (codified as Chapter 9.50 of the Palm Desert Municipal Code) which established mobilehome park rent review. On November 14, 1985, the City enacted as an urgency ordinance ("because of the abuses occurring and which will continue to occur") Ordinance 442, which added a provision preventing a park owner from increasing the rent whenever a mobilehome space becomes vacant or the ownership of a mobilehome is transferred.[2]

On March 27, 1986, the City replaced its prior rent review ordinances with Ordinance 456 ("Ordinance"). See, Ordinance, Petition at D1-25.[3] It permits a park owner to automatically

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ingly lower than current market values" (Petition at 6n.5); "In 1986, at Ordinance enactment, disparity between actual rent and fair market rent was nonexistent or slight. Controlled rent in 1986 was not substantially different from fair market rent for Levald's mobile home park spaces" (Petition at 17). There are also inconsistencies in these statements. For example, *compare*, "Only two sales took place in 1986, and no sales in 1987" (Petition at 17) and "Only *two* sales took place between Ordinance adoption and 1988" (Petition at 19); *with* "In the first year after Ordinance enactment only 7 park mobilehomes sold" (Levald's Ninth Circuit Opening Brief at 28). Under the circumstances, it is respectfully submitted that these allegations be stricken or disregarded. See, 998 F.2d at 684n.1, Petition at A8n.1 (Ninth Circuit granted Motion to Strike similar allegations in Levald's Ninth Circuit briefs).

[2]Although some courts have used the term "vacancy control" to describe this type of provision, it is a misnomer. Since mobilehomes are almost always sold "in place," there is rarely a space "vacancy."

[3]The Preamble to the Ordinance (Petition at D1-2) sets forth some of the reasons for its enactment including "low vacancy rates" and "rapidly escalating rents." After recognizing that mobilehome owners "are property owners with sizeable investments in their mobilehomes and appurtenances," and that there is a "a captive market" and a "great imbalance in the bargaining position of the park owner and the mobilepark tenants in favor of the park owners" the City Council found the Ordinance was

increase his space rent annually by 75% of the CPI increase and also obtain a hardship adjustment to further increase rents if necessary to assure a just and reasonable return. Ordinance, Section 9.50.060, Petition at D11-12. It also provides for continued rent regulation whenever ownership of a mobilehome is changed or transferred. Ordinance, Section 9.50.085, Petition at D20.[4]

B. Procedural History.

On August 23, 1989, prior to seeking any hardship rent increase from the Rent Board to make up for its inability to automatically raise rents whenever a mobilehome was sold,[5] Levald filed a Complaint in federal court. *Indian Springs Trust, a Wisconsin Trust Corporation v. City of Palm Desert*, C.D.Cal., No. SA 89-580 JSL (RWRx).[6] The Complaint consisted of three claims.[7] Claim one alleged that the Ordinance violated substantive due process because it did not advance a legitimate governmental

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necessary. It is designed "to protect the residents of mobilehomes from unconscionable changes in rental rates . . . while simultaneously recognizing and providing for the needs of park owners to receive a just and reasonable return on their property." Petition at D2.

[4]The language of Ordinance, Section 9.50.085 is virtually unchanged from that in Ordinance 442, *supra*.

[5]Levald is well aware of the hardship rent provisions. In 1985 the park obtained a hardship rent increase of $22.05 per space per month. Not satisfied with that amount, it obtained a state court writ directing the Rent Board to increase the hardship increase to take into account certain operating expenses. See, *Indian Springs Ltd. v. Palm Desert Rent Review Board*, 193 Cal.App.3d 127, 238 Cal.Rptr. 112 (1987).

[6]On February 21, 1990 the Complaint was amended to state the complete name of the plaintiff as "Levald, Inc., a Wisconsin Corporation, Trustee of Indian Springs Trust." On March 8, 1991 when the case was transferred to Los Angeles and reassigned to Judge Waters, it was renumbered No. CV-91-1180 LEW (TX).

[7]Federal jurisdiction for these claims was based upon 28 U.S.C. Sections 1331, 1332 and 1343. The Complaint also asked the District Court to assert pendent jurisdiction over state claims for inverse condemnation and declaratory relief.

purpose.[8] Claim two alleged that the Ordinance resulted in a taking (inverse condemnation) by the City.[9] Claim three sought declaratory relief that the Ordinance was an unconstitutional taking in violation of the Fifth and Fourteenth Amendments of the United States Constitution and Article I, Section 19, of the California Constitution. Levald sought damages of $3,820,000, declaratory and other relief.

On October 25, 1989, after its initial motion to dismiss was denied,[10] City filed its answer denying the major allegations of the Complaint and raising various affirmative defenses.

On December 17, 1990, the City's Motion for Summary Adjudication of Issues and Judgment on the Pleadings was granted in part and denied in part.[11] On January 25, 1991, the

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[8]In language very similar to that used by the plaintiff in *Yee* (see, *Yee v. City of Escondido*, 503 U.S._____112 S.Ct. 1522, 118 L.Ed.2d 153, 165 (1992)), Levald contended that a combination of the state Mobilehome Residency Law (Civil Code, Section 798 et seq.) and the Ordinance transferred a possessory interest from the park owner to the residents in the form of an alleged "premium on the sale of a mobilehome." It therefore contended that the Ordinance did not accomplish its "goal" of preventing unreasonable rental rates.

[9]Levald alleged that a taking occurred because under the Ordinance the park owner cannot automatically raise rents to capture the alleged "premium."

[10]On November 7, 1989, the District Court denied City's Motion to Dismiss for lack of ripeness, on statute of limitations grounds, and for failure to state a claim.

[11]The Court determined that the "vacancy control enactment" became effective on or about November 1, 1985 (based on the enactment of Ordinance 442); denied City's request for a one year statute of limitation, ruling Levald's *state* claims may be brought within (5) years of the alleged taking; found diversity jurisdiction did not exist; denied the Motion for Judgment on the Pleadings; and held that the State of California was not an indispensable party.

City's Second Motion for Judgment on the Pleadings and Summary Adjudication also was granted in part and denied in part.[12]

Finally, on September 9, 1991, the Court granted City's Motion to Dismiss the Complaint. See Order, Petition at C1-20. The Court held that Levald's federal facial taking claims were barred by the statute of limitations (Order, Petition at C7-14) and that the substantive due process facial claim failed to state a claim. Order, Petition at C14-20.[13]

On October 9, 1991, Levald filed its Notice of Appeal.

On July 8, 1993, the Ninth Circuit issued its decision affirming in part and reversing and remanding in part. *Levald, Inc. v. City of Palm Desert, supra,* 998 F.2d 680, Petition at A1-32. Initially, the Court held Levald's physical taking claim was foreclosed by this Court's decision in *Yee v. City of Escondido, supra.* See, 998 F.2d at 685, Petition at A9-10.

After permitting Levald to raise "for the first time on appeal" a regulatory taking claim (998 F.2d at 685, Petition at A10-12) and finding that such a facial claim was "ripe" (998 F.2d at 686, Petition at A12-14), the Court held that it was nevertheless barred by the statute of limitations. 998 F.2d at 686-89, Petition at A14-20. In so doing, it held that such a facial claim accrued upon the enactment of the City's Ordinance in 1986 and since

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[12]The Court denied the request for dismissal of the state inverse condemnation claim without prejudice; granted City's request to dismiss the substantive due process facial challenge as being untimely; denied without prejudice City's request to dismiss the substantive due process challenges; denied without prejudice City's request to limit damages to one year prior to the filing of the lawsuit; and granted City's request to bar future damages.

[13]The dismissal of the substantive due process claim was without prejudice. The Court indicated that Levald might be able to state a claim for an "as-applied" due process claim. See, Order, Petition at C20. On or about September 30, 1991, Levald lodged a request seeking an extension of time to file an Amended Complaint, purportedly to state a revised substantive due process claim. On October 8, 1991, the District Court denied the request to file the Amended Complaint.

Levald had not filed suit until 1989, the one year statute of limitations for Section 1983 claims had run. 998 F.2d at 688, Petition at A18. The Court held that the same rule also applied to bar the declaratory relief claim. 998 F.2d at 688-89, Petition at A20.

Next, the Court considered Levald's argument that it nevertheless had stated an "as-applied regulatory taking claim." 998 F.2d at 689-90, Petition at A20-24. After pointing out that such a claim had not been stated in Levald's Complaint (998 F.2d at 689, Petition at A21), the Court, assuming "arguendo" that such a claim had been stated, nevertheless concluded that it should be dismissed because it was "unripe" since (1) such a claim was cognizable in the state courts and (2) Levald had not sought compensation in the state courts prior to bringing this federal claim. 998 F.2d at 689-90, Petition at A22-23.

The Court then considered Levald's substantive due process claim and held that its dismissal was proper because the Ordinance met the "rational relationship" test. 998 F.2d at 690, Petition at A24-26.[14]

The Court, however, did reverse and remand the District Court's denial of Levald's request to amend its Complaint to state a claim for violation of due process "as-applied" (see note 12, *supra*) because the District Court had given no justifying reason for that dismissal. 998 F.2d at 691-92, Petition at A26-30.

On September 3, 1993, the Ninth Circuit denied Levald's Petition for Rehearing and rejected the Suggestion for Rehearing En Banc. See Order, Petition at B1-2.

WHY THIS WRIT SHOULD BE DENIED

This case fails to meet this Court's criteria for review because:

(1) the Ninth Circuit's decision is not a final judgment disposing of the entire case;

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[14] The Court also affirmed the District Court's decision to decline to exercise supplemental jurisdiction over any pendent state law claims. 998 F.2d at 692, Petition at A30.

(2) the Ninth Circuit's decision is consistent with this Court's prior rulings (Supreme Court Rule 10(c)); and

(3) there has been no showing that the Ninth Circuit's decision conflicts with those of other Circuits, or otherwise warrants review. Supreme Court Rule 10(a).

I

THE NINTH CIRCUIT'S DECISION IS NOT A FINAL JUDGMENT DISPOSING OF THE ENTIRE CASE.

This Court should not issue a Writ of Certiorari to review a Judgment of a Circuit Court of Appeals that is not final "unless it is necessary to prevent extraordinary inconvenience and embarrassment in the conduct of the cause." *American Construction Co. v. Jacksonville, T & K.W.R. Co.*, 148 U.S. 372, 384, 13 S.Ct. 758, 37 L.Ed. 486 (1893).

As this court stated in *Hamilton-Brown Shoe Co. v. Wolf Bros. & Co.*, 240 U.S. 251, 258, 36 S.Ct. 269, 60 L.Ed. 629 (1916), the granting of a Petition for Certiorari should

> be exercised sparingly, and only in cases of peculiar gravity and general importance, or in order to secure uniformity of decisions. . . . And, except in extraordinary cases, the writ is not issued until final decree.

This Court has refused to grant a Petition for Certiorari solely on the grounds that a judgment below is not final. See, e.g., *Brotherhood of Locomotive Firemen & Enginemen v. Bangor & Aroostock R. Co.*, 389 U.S. 327, 88 S.Ct. 437, 19 L.Ed.2d 560 (1967) (Court denying certiorari "because the Court of Appeals remanded the case [and thus] it is not yet ripe for review by this Court"). See also, *Virginia Military Institute v. United States*, ____ U.S. ____, 113 S.Ct. 2431, 124 L.Ed.2d 651-52 (1993) (Scalia J., concurring, stating, "We generally await final judgment in the lower courts before exercising our certiorari jurisdiction"); see generally, R. Stern, E. Gressman, S. Shapiro & K. Geller, *Supreme Court Practice* (7th Ed. 1993) Sec. 4.18, p. 196.

On July 8, 1993 the Ninth Circuit issued its decision in *Levald, Inc. v. City of Palm Desert, supra.* In its Petition Levald inaccurately states that the "Ninth Circuit *affirmed* the District Court's dismissal." Petition at 8. In actuality, the Ninth Circuit "AFFIRMED in part, REVERSED and REMANDED in part." See, 998 F.2d at 692, Petition at A31. As discussed *supra*, a portion of this case was reversed and remanded because the lower court failed to state its reasons for denying Levald's motion for leave to amend its substantive due process claim to allege a violation of due process "as-applied."

This Court in its discretion should deny Levald's Petition for Writ of Certiorari because the Judgment in this case is not final since the case has been remanded to the lower court. This case does not present a case of extraordinary circumstances warranting review by this Court prior to a final judgment. A grant of certiorari at this time could result in piecemeal litigation.

II

THE NINTH CIRCUIT CORRECTLY DISMISSED LEVALD'S FACIAL REGULATORY TAKING CLAIM ON STATUTE OF LIMITATIONS GROUNDS

A. There Is A Difference Between Facial And As-Applied Regulatory Taking Claims.

In *Yee v. City of Escondido, supra*, this Court considered similar challenges to the Escondido Mobilehome Rent Protection Ordinance. Initially, this Court held there was no "physical" taking. 118 L.Ed.2d at 168.[15]

After refusing to decide the substantive due process claim because it had not been raised below (118 L.Ed.2d at 168-69), this Court discussed Yee's regulatory taking challenge. In so doing, it carefully distinguished between "facial" and "as-applied" regulatory taking claims. It indicated that an "as-applied"

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[15]In reaching this conclusion this Court indicated its disapproval of *Hall v. City of Santa Barbara*, 833 F.2d 1270 (9th Cir. 1986), *cert. denied*, 485 U.S. 940, 108 S.Ct. 1120, 99 L.Ed.2d 281 (1988).

regulatory taking claim would be "unripe" because Yee had not sought rent increases,[16] but ruled that a "facial" regulatory taking claim would be "ripe" because such a claim does not depend upon the extent to which petitioners were deprived of the economic use of their particular pieces of property or the extent to which they are compensated. 118 L.Ed.2d at 169.[17]

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[16]This Court cited *Williamson County Regional Planning Comm' v. Hamilton Bank*, 473 U.S. 172, 186-97, 105 S.Ct. 3108, 87 L.Ed.2d 126 (1985). *Yee, supra*, 118 L.Ed.2d at 169.

[17]As pointed out *supra* at 7, the Ninth Circuit reached a similar conclusion as to the "ripeness" of Levald's facial regulatory claim. See, 998 F.2d at 686; Petition at A12-14. Applying *Williamson County, supra*, and *Yee, supra*, the Ninth Circuit held that the requirement of seeking a final decision regarding the application of the regulation to the property at issue does not apply to a facial challenge. 998 F.2d at 986; Petition at A12-13. It similarly held that *Williamson County's* second hurdle, the requirement that plaintiffs exhaust available state court remedies was also inapplicable. The Ninth Circuit explained that at the time the alleged taking occurred (i.e., at the enactment of the Ordinance in 1986), California did not recognize damages actions for inverse condemnation based on regulatory takings, and therefore since it would have been futile to seek state court relief, the claim was ripe in the federal courts. 998 F.2d at 686; Petition at A13-14.

Under the circumstances, Levald's position that its "facial" cause of action did not accrue until 1988, while designed to avoid the one year statute of limitations applicable to section 1983 claims, could be a Pyrrhic victory. Assuming arguendo Levald's action accrued in 1988, that was after this Court's decision in *First English Evangelical Lutheran Church v. County of Los Angeles*, 482 U.S. 304, 107 S.Ct. 2378, 96 L.Ed.2d 250 (1987), and at a time when the California state courts did recognize damage actions for inverse condemnation based on regulatory takings. Under the circumstances, if Levald is correct as to the accrual date (which it is not), its suit would therefore be dismissed on lack of ripeness grounds. See, e.g., *Southern Pacific Transportation Co. v. City of Los Angeles*, 922 F.2d 498, 506 (9th Cir. 1990), *cert. denied*, _____ U.S. _____, 112 S.Ct. 382, 116 L.Ed.2d 333 (1991) (Ninth Circuit upheld dismissal of facial challenge that ordinance effected a "taking" because "appellants have not sought compensation through state procedures.") Either way, it is clear the federal courts were correct in dismissing Levald's facial regulatory taking claim.

After pointing out that it was "unclear" if a "regulatory taking" had been raised below, this Court explained that the question of whether a "taking" was "physical" or "regulatory" did not involve separate "claims" but rather separate "arguments" in support of a single "taking" claim. Since Yee had clearly raised a "taking" claim below he could therefore "argue" it was a "regulatory taking." *Id.* at 170. This Court nevertheless dismissed Yee's facial regulatory taking claim because it had not been "fairly included" in "the question petitioners raised seeking certiorari." *Id.* at 172.[18]

In *Hodel v. Virginia Surface Mining & Reclamation Ass'n.*, 452 U.S. 264, 295-297, 101 S.Ct. 2352, 69 L.Ed.2d 1 (1981), this Court also distinguished between "facial" and "as-applied" taking claims. In reviewing the "facial" claim, it phrased the question as "whether the 'mere enactment' of the Surface Mining Act constitutes a taking." 452 U.S. at 295. After finding that the Act did not on its face "den[y] the owner economically viable use of his land," this Court concluded that the "mere enactment" of the Act was not a "taking." *Id.* at 296-97. This Court held that any "as-applied" challenges were not "ripe" because the property owners had not exhausted available administrative remedies. *Id.* at 297. See also, *Hodel v. Indiana*, 452 U.S. 314, 335-36, 101 S.Ct. 2376, 69 L.Ed.2d 40 (1981) (Court held that the "mere enactment" of statute did not on its face deprive owner of

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[18]This Court concluded this discussion by stating, "We leave the regulatory taking issue for the California courts to address in the first instance." 118 L.Ed.2d at 172.

Subsequently, in *Sandpiper Mobile Village v. City of Carpinteria*, 10 Cal.App.4th 542, 12 Cal.Rptr.2d 623 (1992), *cert. denied*, ___ U.S. ___, 113 S.Ct. 1850, 123 L.Ed.2d 473 (1993), the state court did "address" similar regulatory taking claims brought by another park owner. The Court held that the facial regulatory taking claim failed because the mobilehome park rent review ordinance neither deprived the park owner of all economic use of its property nor failed to substantially advance legitimate state interests. *Sandpiper*, *supra*, 10 Cal.App.4th at 549-51. The Court also dismissed the parkowner's "as-applied" regulatory taking claims on lack of "ripeness" grounds "[b]ecause Sandpiper has not alleged that it has attempted to change the use of its park or to apply for rent increases." *Id.* at 549.

beneficial use of his property and dismissed as premature other "as-applied" challenges); *Pennell v. San Jose*, 485 U.S. 1, 10, 108 S.Ct. 849, 99 L.Ed.2d 1 (1988) (Court held that "on its face" the Ordinance did not require a rent reduction due to tenant hardship and refused to consider "as-applied" challenges where the situation had not yet occurred); *Keystone Bituminous Coal Ass'n v. De Benedictis*, 480 U.S. 470, 494, 107 S.Ct. 1232, 94 L.Ed.2d 472 (1987) (Court recognized distinction between claim that mere enactment of statute constitutes a taking and claim that particular impact of governmental action is a taking).[19]

Levald's reliance (Petition at 12) upon *Norco Construction Inc. v. Kings County*, 801 F.2d 1143 (9th Cir. 1986), is misplaced. There the developer was not making a facial challenge to an ordinance, but instead was seeking damages for a county's failure to approve its preliminary plat application. Under the circumstances, the Court held that its cause of action (for a temporary taking) did not accrue until the County finally decided to approve its application. See, 801 F.2d at 1146.

Similarly, Levald's reliance on two California cases, *Britt v. Superior Court*, 20 Cal.3d 844, 143 Cal.Rptr. 695 (1978), and *Smart v. City of Los Angeles*, 112 Cal.App.3d 232, 169 Cal.Rptr. 174 (1980) (Petition at 13 n.12), is also misplaced. Neither case involved facial challenges to a statute or ordinance. Instead, both involved alleged takings due to noise from overflying aircraft.[20]

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[19]*Lucas v. South Carolina Coastal Council*, 505 U.S. ___, 112 S.Ct. 2886, 120 L.Ed.2d 798, 813 n.6 (1992), is not to the contrary. It merely restates the test to be applied in facial taking challenges — "A statute regulating the uses that can be made of property effects a taking if it 'denies an owner economically viable use of his land.' "

[20]*Bacon v. United States*, 295 F.2d 936 (Ct. Cl. 1961); *Jensen v. United States*, 305 F.2d 444 (Ct. Cl. 1962); *Aaron v. United States*, 311 F.2d 798 (Ct. Cl. 1963); and *Baker v. Burbank-Glendale-Pasadena Airport Authority*, 39 Cal.3d 862, 218 Cal.Rptr. 293 (1985), *cert. denied*, 475 U.S. 1017, 106 S.Ct. 1200, 89 L.Ed.2d 314 (1986) (see, Petition at 22 n.18 and 24 n.19), were all "airport noise" cases and also did not involve facial challenges to ordinances. *Capogeannis v. Superior Court*, 12 Cal.App.4th 668, 15 Cal.Rptr.2d 796 (1993), was similar in

In any event, Levald concedes (Petition at 12) that when a federal claim accrues is a question of federal not state law. See, e.g., *National Advertising Co.v. City of Raleigh*, 947 F.2d 1159, 1162 (4th Cir. 1991), *cert. denied*, ___ U.S. ___, 112 S.Ct. 1997, 118 L.Ed.2d 593 (1992).

Here, Levald could potentially state two types of regulatory taking challenges: a "facial" challenge and an "as-applied" challenge. In its Petition Levald attempts to meld the two. Although Levald refers to "an ordinance subject to facial challenge" ("Questions Presented," Petition at i), it then proceeds to argue what is basically an "as-applied" claim, that is, that the subsequent enforcement of the ordinance created the cause of action. Petition at 18. Almost by definition, a "facial" claim arises at the "enactment" of the ordinance. An "as-applied" claim results from its "application" to particular circumstances and property. See, *Hodel, supra,* 452 U.S. at 297.

B. Every Circuit Court Which Has Considered The Issue Has Held That Facial Regulatory Taking Claims Accrue On The Enactment Of The Ordinance.

In *De Anza Properties X Ltd. v. County of Santa Cruz,* 936 F.2d 1084 (9th Cir. 1991), the Ninth Circuit reviewed a virtually identical challenge to Santa Cruz County's mobilehome space rent control ordinance. There the ordinance had been enacted in 1982 and suit was not filed until January 1987. The Court stated:

> It is undisputed that if appellant's cause of action accrued when the ordinance was enacted in 1982, then the appellant's claim is time-barred.
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> 936 F.2d at 1085.

The Court then discussed De Anza's various attempts to circumvent that bar. Initially, it pointed out that although the ordinance had been modified in August 1987, the provision challenged had remained the same since 1982 and therefore its reenactment had not changed its impact on De Anza. 936 F.2d at 1086. It then discussed De Anza's alternate contention that "a

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that it involves a suit for damages caused by contamination from a fuel tank leakage and also did not involve a facial challenge to an ordinance.

new cause of action accrues each time one of the appellant's tenants sells a mobilehome to a new tenant and appellants are precluded from raising rent." 936 F.2d at 1087. The Court pointed out that this approach was inconsistent with the theory set forth in *Hall & City of Santa Barbara, supra*, that it was the "Ordinance" that had transferred a possessory interest in the park owner's land to the tenants and that the "taking" did not depend upon the existence of a sale. *Ibid.*

Here, the same reasoning applies. In its Complaint, Levald contended that it was a combination of the state Mobilehome Residency Law "and the Ordinance [which] transfer[red] a possessory interest from the mobilehome park owner to the mobilehome tenant." Complaint at 8. Even though it now contends that only 14 sales took place prior to 1989 when it filed suit (see, Petition at 17-18), Levald's Complaint sought damages of "$3,820,000 ($20,000 x 191 [the] number of mobilehomes at the Subject Property) for the value of the possessory interests taken. . . ." See, Complaint at 12. Therefore, it is apparent that the allegations in Levald's Complaint did not depend upon whether or not a particular mobilehome had sold or not, but instead sought damages for a park-wide "taking" based on the enactment of the Ordinance.

In *Azul Pacifico, Inc. v. City of Los Angeles*, 948 F.2d 575 (9th Cir. 1991), the Ninth Circuit again considered the application of the statute of limitations in the context of a similar challenge to a mobilehome space rent review ordinance. After holding that Azul's physical taking challenge was ripe (948 F.2d at 579) and valid under *Hall, supra* (948 F.2d at 581-82), it nevertheless held that under *De Anza, supra,* the limitations period for a facial taking claim begins to run on the date the challenged ordinance is enacted (948 F.2d at 586), and since "vacancy control" was enacted in May 1982, Azul's claims filed pursuant to 42 U.S.C. Section 1983 in April 1987 were barred. *Ibid.* However, after pointing out that Azul had also stated claims directly under the Constitution, the Court held that those Constitutional claims were not governed by the same statute of limitations applied to Section 1983 claims. Instead, it concluded that a five or six year statute applied, and therefore found the claims to be timely. 948

F.2d at 587. In addition, the Ninth Circuit remanded the case to the District Court because it had miscalculated damages holding that in determining damages for a "physical" taking, a taking occurred "when the Los Angeles vacancy control *ordinance was passed, not at the time of the sale of the coaches*" (emphasis added). 948 F.2d at 584-86.

Following this Court's decision in *Yee v. City of Escondido, supra,* the Ninth Circuit granted rehearing, withdrew its opinion at 948 F.2d 575, and issued a new opinion dismissing the action. *Azul Pacifico Inc. v. City of Los Angeles,* 973 F.2d 704 (9th Cir. 1992), *cert. denied,* ____ U.S. ____, 113 S.Ct. 1049, 122 L.Ed.2d 357 (1993). After first concluding that a litigant complaining of a constitutional right *must* sue pursuant to 42 U.S.C. Section 1983 (see, 973 F.2d at 705), the Court stated:

> The cause of action accrued when the ordinance at issue here was enacted. *De Anza Properties X, Ltd. v. Santa Cruz County,* 936 F.2d 1084, 1085 (9th Cir. 1991). Azul should have filed its complaint within three years of the May 1982 date of enactment or within one year of the Supreme Court's decision in *Wilson v. Garcia,* 471 U.S. 261, 105 S.Ct. 1938, 85 L.Ed.2d 254 (1985). See, *Usher v. Los Angeles,* 828 F.2d 556, 561 (9th Cir. 1987) The limitations period under those alternatives expired in May 1985. Azul did not file its complaint until April 1987.
>
> *Ibid.*

Circuit Judge Kozinski (who had authored both *Hall* and the original *Azul* decision), while agreeing that the Petition for Rehearing must be granted (*Ibid.*), dissented from the dismissal arguing that *De Anza* had been implicitly overruled by *Yee* and *Lucas. Ibid.* Contrary to Levald's implication (Petition at 14), the action of the majority in dismissing *Azul* clearly indicated their disagreement with Judge Kozinski's position.[21]

In *National Advertising Co. v. City of Raleigh, supra,* 947 F.2d 1158, the Fourth Circuit reached a similar conclusion and also

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[21]In the instant case it is clear that the Ninth Circuit also followed *De Anza* and were not convinced by Judge Koziwski's dissent in *Azul.*

dismissed a facial taking claim on statute of limitation grounds. In 1983, Raleigh had adopted an ordinance restricting off-premise outdoor advertising signs. In 1989, National sued in federal court claiming the ordinance was a taking. The District Court dismissed, finding the Section 1983 action was barred by the applicable state statute of limitations. On appeal, National contended that on the date the ordinance passed, it had not suffered injury, and no cause of action accrued until a 5½ year grace period for nonconforming signs expired, at which time its signs would have to comply with the ordinance.

The Fourth Circuit disagreed, holding

> National's cause of action arose when the ordinance was enacted because it was then, if at all, that National suffered the regulatory interference with the primary uses of its property.
>
> 947 F.2d at 1163.

In response to National's argument that no challenge to the ordinance was possible before April 1989 (after the 5½ year grace period), the Court stated, "National's contentions miss the mark. Immediately upon enactment, the 1983 ordinance interfered in a clear, concrete fashion with the property's primary uses" (*Ibid*) because "the present value of the nonconforming signs were reduced accordingly." 947 F.2d at 1163-64.

Levald's contention that it could not have suffered any injury until the 1988 sales (Petition at 17-20) is similarly erroneous. It was the enactment of the ordinance not the subsequent sales of the mobilehomes which "took" from Levald any "right" it had to increase rents at the time a mobilehome was transferred.[22]

Levald attempts to avoid this obvious fact by arguing that its injury was "continuous." In *National Advertising Co. v. City of*

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[22]Levald's attempt to calculate both its loss and its damages based on the sales of mobilehomes also violates the fundamental rule that in determining taking damages the question is "What has the owner lost?" not "What has the taker gained?" See, *Boston Chamber of Commerce v. Boston*, 217 U.S. 189, 195, 30 S.Ct. 459, 54 L.Ed. 725 (1910).

Raleigh, supra, the Fourth Circuit in response to a similar argument that the ordinance before it created a "continuing" constitutional violation, held:

> as has been observed many times "a continuing violation is occasioned by continual unlawful acts, not continual ill effects from an original violation." [Citation]
>
> 947 F.2d at 1166.

The Court continued:

> Here, any taking occurred at the time of the ordinance's enactment; what continued was the ill effect of the ordinance's enactment and the alleged taking. No continuing unlawful acts have been shown.
>
> *Ibid.*

See also, *Ward v. Caulk*, 650 F.2d 1144, 1147 (9th Cir. 1981) (Acknowledging the existence of the "continuing wrong" doctrine but rejecting it under the facts in that case because the "continuing wrong violation is occasioned by continual unlawful acts, not by continual ill effects from an original violation").

Levald's reliance (Petition at 20) on *United States v. Dickinson*, 331 U.S. 745, 67 S.Ct. 1382, 91 L.Ed. 1789 (1947), for the proposition that its injury was "continuous" is misplaced. In *Dickinson*, property owners sued in 1943 under the Tucker Act to recover the value of their property which they claimed had been taken without compensation when the Government dammed a river and raised the water level by successive stages until it permanently flooded part of their land. The Government alleged that the land owner's claim was barred by the six year statute of limitations which began to run when the dam began to impound water in October 1936 or no later than May 1937 when the dam was capable of operation and the land owner was partially submerged for the first time. 331 U.S. at 747. In holding that the statute of limitations did not bar the land owner's claims, this Court stated that

> . . . when the Government chooses not to condemn land but to bring about a taking by a *continuing process of physical*

> *events* the owner is not required to resort to piecemeal or premature litigation . . .
>
> 331 U.S. at 749 (emphasis added).

In contrast to *Dickinson*, the instant case does not involve a physical occupation of the park owner's land. Rather, if there has been an interference with its "property," it occurred upon enactment of the Ordinance. Levald has not alleged any continuing unlawful acts other than the enactment of the Ordinance. Failure to receive increased space rent upon the sale of a mobilehome is merely an "effect" of the Ordinance, not a continuing wrong by the City. See, *National Advertising Co. v. City of Raleigh*, *supra*, rejecting the "continuing wrong" doctrine when the only "wrong" is the enactment of an ordinance.

Since at least November 1985 City has had an ordinance in effect which restricted Levald's ability to raise rent whenever a mobilehome was sold or transferred. It is undisputed that Levald was aware of this provision at or near the time of its enactment.[23] Levald's belated claim (after *Yee*) that he suffered no injury until there were a substantial number of sales of mobilehomes is not only inconsistent with his Complaint (discussed *supra*), but also with the general rule that the statute of limitation begins to run when a plaintiff "knows or has reason to know of the injury which forms the basis for the action." See, e.g., *Peter Henderson Oil Co. v. City of Port Arthur, Tex.*, 806 F.2d 1273, 1275 (5th Cir. 1987) (Court dismissed facial attack on City Ordinance which required neighbors consent for drilling activity, ruling that since Oil Com-

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[23]See, e.g., an August 20, 1985 letter from Mr. Goldstein, Levald's primary agent, to City addressing the "vacancy control" issue. CR 24, Ex. "D".

Levald's argument that the application of the statute of limitations to bar its claims would violate due process (Petition at 25-26) adds nothing. Unlike the situation in *Tulsa Professional Collection Services, Inc. v. Pope*, 485 U.S. 478, 108 S.Ct. 1340, 99 L.Ed.2d 565 (1988), where this Court ruled that publication was inadequate notice of probate proceedings to a known or "reasonably ascertainable" creditor, here there is no question that Levald was aware of and knew of the enactment of the Ordinance and that it would effect his right to increase rent at the time a mobilehome was transferred.

pany had knowledge of Ordinance its failure to file suit until five years later barred the suit).

Levald's claim that the Ordinance's restrictions on raising rents when mobilehomes were sold "took" his property is far from unique. At least as early as 1984 identical arguments had been made in the state courts. See, *Oceanside Mobilehome Park Owners Ass'n. v. City of Oceanside*, 157 Cal.App.3d 887, 906-07, 204 Cal.Rptr. 239 (Court dismissed argument as "flawed".) Yet even after *Hall, supra,* had been decided by the Ninth Circuit in 1986, Levald waited until 1989 to file similar claims. This delay was clearly improper. See also, *McConnell v. Critchlow*, 661 F.2d 116, 118 (9th Cir. 1981) (Court rejected plaintiff's contention that statute of limitations on suit against City officials for false arrest did not commence running until this Court's decision in *Monell v. Dept. of Social Services*, 436 U.S. 658, 98 S.Ct. 2018, 56 L.Ed.2d 611 (1978) finding that allowing such a delayed accrual could "result in an outpouring of stale, difficult to defend claims, contrary to the policy underlying limitation statutes").

C. Under The Circumstances, Levald's Facial Regulatory Taking Claim Is Barred Because It Was Not Filed Within One Year Of The Enactment Of The Ordinance.

In *Wilson v. Garcia*, 471 U.S. 261, 276, 105 S.Ct. 1938, 85 L.Ed.2d 254 (1985), this Court determined that the applicable statute of limitations for all claims brought under 42 U.S.C. Section 1983 is the state statute applicable to a tort action for the recovery of damages for personal injuries. See also, *Owens v. Okure*, 488 U.S. 235, 109 S.Ct. 573, 102 L.Ed.2d 594 (1989) (If state has more than one statute of limitations, Section 1983 claim is governed by the residual or general personal injury statute of limitations).

Levald concedes (Petition at 16), that "[i]n California, the limitation period for personal injury is one year; pursuant to California Code of Civil Procedure Section 340(3)." See, e.g., *Usher v. Los Angeles*, 828 F.2d 556, 561 (9th Cir. 1987) (Section 1983 claims arising after *Wilson v. Garcia, supra*, apply California's one year statute of limitations for personal injury torts); *McMillan v. Goleta Water Dist.*, 792 F.2d 1453, 1456 (9th Cir.

1985), *cert. denied*, 480 U.S. 906, 107 S.Ct. 1348, 94 L.Ed.2d 519 (1987) (Statute of limitations applicable to Section 1983 inverse condemnation claims is the one year limitation set forth in California Code of Civil Procedure, Section 340(3)).

Here, the provision of the Ordinance challenged (Section 9.50.085) has been in constant application since the enactment of Ordinance 442 in November 1985 (see Petition at C2) and has been a part of the current Ordinance (Ordinance 456, Petition at D20-21) since March 1986. See, Petition at C2. Pursuant to this Court's rulings (e.g., *Wilson v. Garcia*, *supra*) any claim brought under 42 U.S.C. Section 1983 making a facial attack on the Ordinance had to be brought within one year. Therefore, any "facial" challenge to Section 9.50.085 of the Ordinance had to be filed at least by March 1987 and probably by November 1986. Here, Levald admits (Petition at 6) that it did not file its Complaint until August 23, 1989, more than three years after the enactment of Ordinance 456. Under the circumstances, Levald's "facial" taking claim is clearly barred.

III

THE NINTH CIRCUIT ALSO CORRECTLY DISMISSED LEVALD'S DECLARATORY RELIEF CLAIM ON STATUTE OF LIMITATIONS GROUNDS

Although not raised in its "Questions Presented" (see, Petition at i),[24] Levald also argues that the statute of limitations is inapplicable to its declaratory relief claim (Petition at 24). Levald's argument is without merit.

In *Cope v. Anderson*, 331 U.S. 461, 463-464, 67 S.Ct. 1340, 91 L.Ed. 1602 (1947), this Court held that where a party has concurrent equitable and legal claims, a Court in equity will not grant relief when the statute of limitations would bar the concurrent legal remedy.

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[24]Pursuant to *Yee v. City of Escondido*, *supra*, 118 L.Ed.2d at 171-72, Supreme Court Rule 14.1(a) provides that issues not raised in the "Questions Presented" will normally not be considered.

Similarly, in *Russell v. Todd*, 309 U.S. 280, 289, 60 S.Ct. 527, 84 L.Ed. 754 (1940), this Court held that:

> Even though there is no state statute applicable to similar equitable demands, when the jurisdiction of the federal court is concurrent with that at law, or the suit is brought in aid of a legal right, equity will withhold its remedy if the legal right is barred by the local statute of limitations.[25]

Citing *Cope* and *Russell,* the First Circuit held in a similar takings case:

> To prevent plaintiffs from making a mockery of the statute of limitations by the simple expedient of creative labelling — styling an action as one for declaratory relief rather than for damages — courts must necessarily focus upon the substance of an asserted claim as opposed to its form. It is settled, therefore, that where legal and equitable claims coexist, equitable remedies will be withheld if an applicable statute of limitations bars the concurrent legal remedy.

Gilbert v. City of Cambridge, 932 F.2d 51, 57 (1st Cir. 1991), *cert. denied,* ____ U.S. ____, 112 S.Ct. 192, 116 L.Ed.2d 153 (1991).

Other Circuits agree:

> If a claim for declaratory relief could have been resolved through another form of action which has a specific limitations period, the specific period of time will govern.

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[25]Levald's reliance (Petition at 25 n.21) upon *Holmberg v. Armbrecht*, 327 U.S. 392, 66 S.Ct. 582, 90 L.Ed.2d 743 (1946), is misplaced. There, unlike the instant case, the case concerned "not only a federally-created right but a federal right for which the sole remedy is equity." See, 327 U.S. at 395. It was in that special circumstance that this Court refused to apply a state statute of limitations. *Castner v. First National Bank of Anchorage*, 278 F.2d 376, 385 (9th Cir. 1960), is similar. There the Ninth Circuit ruled in an appeal from the Alaska Territorial Court that an action seeking an accounting and a receiver was within the "exclusive providence of a court of equity" and therefore the governing limitations was laches not statute of limitations.

Orangetown v. Gorsuch, 718 F.2d 29, 42 (2nd Cir. 1983), *cert. denied,* 465 U.S. 1099, 104 S.Ct. 1592, 80 L.Ed.2d 124 (1984). See also, *Swan v. Board of Higher Education,* 319 F.2d 56, 59-60 (2nd Cir. 1963) (Section 1983 action seeking declaratory relief barred by statute of limitations).

Under the circumstances, the statute of limitations barring its facial regulatory taking claim also bars Levald's claim for declaratory relief based on the same facts.

IV

APPLICATION OF THE STATUTE OF LIMITATIONS TO BAR THIS ACTION IS APPROPRIATE

Levald's contention that "if an ordinance is unconstitutional, the statute of limitations is no bar to suit" (Petition at 23-25) approaches tautological dimensions. If an ordinance is in fact unconstitutional, then of course there must be a way to challenge it. See, e.g., *Brown v. Board of Education*, 347 U.S. 483, 74 S.Ct. 686, 98 L.Ed. 873 (1954); *Griswold v. Connecticut*, 381 U.S. 479, 85 S.Ct. 1678, 14 L.Ed.2d. 510 (1965). However, the issue presented here is not whether Levald is forever prevented from showing that the Ordinance is unconstitutional, but instead whether this facial challenge is barred. The barring of this facial challenge will not prevent Levald from raising a proper "as-applied" challenge — e.g., if it can show that the application of the Ordinance prevents it from obtaining a fair return on its investment.

In its Petition, Levald has characterized its claim as one for a "facial regulatory taking", but argues that this "facial" claim did not accrue when the Ordinance was enacted but only later when *it* decided *it* was first "damaged." Petition at 20. If this Court were to allow such a self-determined delayed accrual theory — statutes of limitation would become meaningless. In fact, this Court has recognized the efficacy of statutes of limitations, even in civil rights cases.[26] See, e.g., *O'Sullivan v. Felix*, 233 U.S. 318, 34

[26]Today, even the United States is subject to having its claims for money damages barred by applicable statutes of limitation. See, e.g., 28 U.S.C. Section 2415 (limitation period for money damage claims), also

S.Ct. 596, 58 L.Ed. 980 (1914) (This Court applied Louisiana's one year statute of limitations to bar civil rights suit); *Johnson v. Railway Express Agency*, 421 U.S. 454, 462-63, 95 S.Ct. 1716, 44 L.Ed.2d 295 (1975) (This Court held 42 U.S.C. Section 1981 claims barred by Tennessee's one year statute of limitations). See also, *Runyon v. McCrary*, 427 U.S. 160, 180-182, 96 S.Ct. 2586, 49 L.Ed.2d 415 (1976) (While holding that 42 U.S.C. Section 1981 prohibited private schools from excluding Blacks, this Court refused to award damages finding them barred by applicable statute of limitations).

In *Wilson v. Garcia, supra*, 471 U.S. at 271, this Court stated:

> A federal cause of action "brought at any distance of time" would be "utterly repugnant to the genius of our laws." *Adams v. Woods*, 2 Cranch 336, 342 (1805). Just determinations of fact cannot be made when, because of the passage of time, the memories of witnesses have faded or evidence is lost. In compelling circumstances, even wrongdoers are entitled to assume that their sins may be forgotten.[27]

This Court then further explained that

> [t]he borrowing of statutes of limitations for Section 1983 claims serves those policies of repose . . . [and] incorporates the State's judgment on the proper balance between policies of repose and the substantive policies of enforcement embodied in the state cause of action.
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> *Ibid.*

This Court continued by recalling that Section 1983 provides "a uniquely federal remedy against incursions under the claimed

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28 U.S.C. Section 2409a(q) (limitation period for quiet title actions involving lands in which United States claims an interest); 28 U.S.C. Section 1658 (limitations for actions arising under Acts of Congress).

[27] Almost from the beginning of our Country's history, statutes of limitations have been applied to stabilize property interests. See, e.g., *Lewis v. Marshall*, 30 U.S. (5 Pet.) 470, 477-78, 8 L.Ed. 195 (1831) ("the best interests of society require that causes of action should not be deferred an unreasonable time. This remark is peculiarly applicable to land titles").

authority of state law upon rights secured by the Constitution and laws of the Nation." *Id.* at 271-72.

Levald has made no demonstration why its action should have any special immunity from the statutes of limitations applied to other Section 1983 claims.

CONCLUSION

After its "physical taking" claim became untenable after this Court's *Yee* decision, Levald attempted to argue "for the first time on appeal" (see, 998 F.2d at 685, Petition at A10-11) that the Ordinance effected a "facial regulatory taking". The Ninth Circuit carefully considered Levald's arguments and correctly held that the facial regulatory taking claim was barred by applicable statutes of limitations. Under the circumstances, this Court should deny Levald's Petition because it is clear that the Ninth Circuit's decision was in accord with the Court's prior rulings, was not in conflict with those of other Circuits and otherwise fails to warrant review by this Court.[28]

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DONALD R. LINCOLN
(Counsel of Record)
LINDA B. REICH
ENDEMAN, LINCOLN, TUREK & HEATER
600 B Street, Suite 2400
San Diego, California 92101
(619) 544-0123

DAVID J. ERWIN
City Attorney
MICHAEL J. ANDELSON
MARSHALL S. RUDOLPH
BEST, BEST & KRIEGER
39700 Bob Hope Drive #312
Rancho Mirage, California 92270
(619) 568-2611

Attorneys for Respondent
City of Palm Desert

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[28]See, e.g. *supra* at 10-12, (pointing out that contrary to Levald's implication the case is not final but instead has been remanded to the District Court); *supra*, at 11-12, n.16 (pointing out that if Levald avoids the statute of limitations, his case is subject to dismissal for lack of "ripeness" for failure to exhaust state court remedies); *supra* at 12 n.17 (pointing out that in any event when viewed on the merits Levald's facial regulatory taking claim fails to state a claim).